



# Litigation Update

Litigation Section News

January 2005

## No prejudgment interest under CCP § 998 unless action is for personal injuries.

*California Civil Code* § 3291 authorizes pre-judgment interest if a defendant fails to accept an offer to compromise under *California Code of Civil Procedure* § 998 and the judgment exceeds the amount of the offer. But this only applies to personal injury damages, not to damages for insurance bad faith. *George F. Hillenbrand, Inc. v. Ins. Co. of North America* (Cal.App. Third Dist., October 29, 2004) 123 Cal.App.4th 846, [2004 DJDAR 13276]; see also, *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, [3 Cal.Rptr.3d 666].

**Tort claimant need not specify specific theories of liability in government claim.** The California Supreme Court has held that the *Tort Claims Act* (*Gov. Code* § 810 *et seq.*) does not preclude a dismissed government employee from asserting theories in a complaint for wrongful termination, even though these theories were not specified in the notice of claim. "Only

where there has been a 'complete shift of allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim, have courts generally found the complaint barred.'" *Stockett v. Assn. of Calif. Water Agencies Joint Powers Ins. Authority* (Cal.Supr.Ct.; November 1, 2004) [2004 DJDAR 13311]; see also, *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, [267 Cal.Rptr. 13].

**Not every representative or class action is "in the public interest" and thus, not necessarily exempt from the anti-SLAPP statute.** Recently enacted *California Code of Civil Procedure* § 425.17 exempts actions brought solely in the public interest or on behalf of the general public from the anti-SLAPP statute (*Civ.Proc.* § 425.16). But, before the exemption applies, certain conditions must be met. These conditions are analogous to the elements for determining eligibility for a fee award under the private attorney general doctrine (*Civ.Proc.* § 1021.5). An action brought against DIRECTV, based on demand letters sent to person who had purchased pirating devices, did not meet these requirements and was thus, subject to the anti-SLAPP statute, and was properly dismissed. *Blanchard v. DIRECTV, Inc.* (Cal.App. Second Dist., Div. 3; October 29, 2004) 123 Cal.App.4th 903, [2004 DJDAR 13338].

**Attorney who prepared will is not liable to beneficiary where testator's intent is in dispute.** Several cases have held that where a lawyer's negligence deprives an intended beneficiary from realizing that status, the lawyer may be liable to the intended beneficiary either on a third party beneficiary theory, or on a negligence

theory. See, *Heyer v. Flaig* (1969) 70 Cal.2d 223, [449 P.2d 161, 74 Cal.Rptr. 225] (lawyer failed to advise testator of effect of marriage, depriving intended beneficiary of legacy); *Lucas v. Hamm* (1961) 56 Cal.2d 583, [364 P.2d 685; 15 Cal.Rptr. 821] (beneficiary lost bequest because lawyer negligently failed to have the will properly attested).

But these cases do not apply, and the lawyer owes no duty to beneficiaries, when there is a question of fact whether the testator intended to benefit the claimants. A contrary holding would create a conflict between the lawyer's duty to the testator and to the claimant. See, *Boranian v. Clark* (Cal. App. Second Dist., Div. 1; November 1, 2004) 123 Cal.App.4th 1012, [2004 DJDAR 13408]; *Featherson v. Farwell* (Cal. App. Second Dist., Div. 1; November 1, 2004) 123 Cal.App.4th 1022, [2004 DJDAR 13411].

**Legislature cannot determine that a statute is "declarative of existing law" if, in fact, it is not.** In *Carrisales v. Department of*

### Litigation Section Events Section Education Institute

January 28–30, 2005  
Palace Hotel  
San Francisco, CA

See Website for Details:  
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### Annual Trial Symposium

April 15–17, 2005  
Silverado Country Club and Resort  
Napa Valley, CA  
Details Available on Website Soon

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### Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at [PRenne@cooley.com](mailto:PRenne@cooley.com) or to Rick Seabolt at [RLSeabolt@HRBlaw.com](mailto:RLSeabolt@HRBlaw.com)

*Corrections* (1999) 21 Cal.4th 1132, [1988 P.2d 1083, 90 Cal.Rptr.2d 804 ], the California Supreme Court held that Gov. Code § 2940 (part of the FEHA) did not impose liability on employers for harassment by non-supervisory employees. The legislature responded by amending § 2940, to impose such liability. The amended statute also stated that it was “declaratory of existing law.” Plaintiff sought to impose liability under the amended statute for conduct that preceded its passage. *Citing, Marbury v. Madison* (1803) 5 U.S. 137, 177, the California Supreme Court concluded that the legislature had exceeded its power. It was for the court, not the legislature, to determine the effect of the amendment. *McClung v. Employment Development Department* (Cal.Supr.Ct., S121568; November 4, 2004) [2004 DJDAR 13516].

**In order to enforce a foreign judgment in California, the court must first obtain personal jurisdiction over the defendant.** *California Code of Civil Procedure* § 1713.3 permits enforcement of a foreign judgment by bringing an action in California. But, as in any other action, the court cannot enforce the judgment absent personal jurisdiction over the defendant. *Societe Civile Succession Richard Guino, A French Trust, et al., v. Redstar Corporation* (Cal. App. Second Dist., Div. 5; November 3, 2004) [2004 DJDAR 13524].

## Discussion Board Participation

We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion. Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: [www.Calbar.ca.gov](http://www.Calbar.ca.gov) to explore the new bulletin board feature—just another benefit of Litigation Section membership.

**Anti-SLAPP statute does not protect lawyers from suits for breach of duties to their clients.** The Second District Court of Appeal in *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, [7 Cal.Rptr.3d 715], held that the anti-SLAPP statute (*Civ.Proc.* § 425.16) does not apply to actions for legal malpractice. The Second District has now determined that the statute also does not shield lawyers from suits by former clients based on a breach of the duty of loyalty. See, *Benasra v. Mitchell Silberberg & Knupp LLP* (Cal. App. Second Dist., Div. 4; November 5, 2004) [2004 DJDAR 13564].

**Changes in the CCP, effective January 1, 2005.** AB 3078, signed by Governor Schwarzenegger, makes several changes in the *California Code of Civil Procedure*. The most significant are:

*Code Civ.Proc.* § 411.20 has been amended, probably in response to *Duran v. St. Luke's Hospital* (2003) 114 Cal.App.4th 457, [8 Cal.Rptr.3d 1]. The case held that the clerk properly refused to accept a complaint for filing where the fee tendered was \$3.00 less than the proper filing fee; because the complaint had been presented for filing on the last day before the statute of limitations ran, plaintiff's case was dismissed. *Code Civ.Proc.* § 411.20 previously provided that if the check tendered to the clerk bounces, the clerk must give notice and the offending party has 20 days to provide the required amount in cash or by certified check. The amendment adds a similar procedure where the amount tendered is less than the required fee.

*Code Civ.Proc.* § 1005 deals with notice periods for motions. Previously the statute required moving papers to be served and filed 21 calendar days before the noticed hearing. In the amended version, the time period is changed to 16 court days. The time for filing and serving opposition papers was changed from 10 calendar days to 9 court days and for reply papers from 5 calendar days to 5 court days. The statute does not tell us whether days when some courts are closed because of budgetary restraint count as “court days” or not. And remember that the time for

serving the notice of motion is extended 5, 10, or 20 days where service is by mail, respectively within California, to a recipient in another state, or one outside the United States.

*Code Civ.Proc.* § 2016.060 (new) provides that when the last day to perform an act under the discovery statutes falls on a weekend or court holiday, the time limit is extended to the next court day.

*Code Civ.Proc.* § 2024 has been amended to provide that where matters relating to discovery must be completed a specified number of days before trial (e.g., completion of discovery, motions relating to discovery, expert witness discovery), and that date falls on a weekend or court holiday, the time limit is likewise extended to the next court day closer to the trial date. This clears up an issue that has confounded the courts for some years.

**Right to sexual privacy is before the California Supreme Court.** In our October newsletter, we reported that *John B. v. Superior Court* (Cal.App. Second Dist., Div. 8; August 23, 2004) 121 Cal. App. 4th 1000, [18 Cal. Rptr. 3d 48, 2004 DJDAR 10515], an action where a wife sued her husband, alleging he had infected her with HIV, the court affirmed an order disclosing husband's medical records and details of his sexual background in response to discovery demands. The California Supreme Court has now granted hearing in the case (Case number S128248). As a result, the case may no longer be cited.

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